

SUPREME COURT OF INDIA

Sayed Darain Ahsan @ Darain

Vs.

State of W.B.

Crl.A.No.1195 of 2006

(A. K. Patnaik and Swatanter Kumar JJ.)

22.03.2012

JUDGMENT

A. K. PATNAIK, J.

1. This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment dated 12.05.2006 of the High Court of Calcutta in C.R.A. No.244 of 2003 affirming the conviction of the appellant under Section 302 read with Section 34 of the Indian Penal Code (for short 'IPC') as well the sentence of life imprisonment imposed on the appellant by the trial court and dismissing the appeal of the appellant.

2. The facts briefly are that an FIR was lodged with the Officer-in-charge of the Garden Reach Police Station, Calcutta, on 11.02.2001 at about 10.18 P.M. by Md. Rashid Khan. In the FIR, Rashid stated that on 11.02.2001 at about 9.45 P.M. when he was sitting along with Md. Shamim Ansari at the junction of Iron Gate Road and Risaldar Gate Road and gossiping, Md. Jahangir alias Mughal walked along Iron Gate Road towards Garden Reach Road at about 9.50 P.M. Suddenly, they heard a sound of firing from the side of Iron Gate Road and both went there running and saw that eight to ten persons had encircled Mughal and were firing at him again and again. Mughal fell down on the street and the assailants fled away from the spot in different directions and he could not recognize the appellant as one of the assailants. Thereafter, Rashid and Shamim and some people who had gathered from neighbouring areas took Mughal to Hannan Nursing Home at B-79, Iron Gate Road, where Mughal was declared dead. The Officer-in-Charge of the Police Station registered a case under Sections 120B/302, IPC, and 25(1B)(a)/27 of the Arms Act against the appellant and directed Sub-Inspector B.C. Sarkar to take up

the investigation of the case. After investigation, chargesheet was filed against the appellant and Abuzar Hossain under Section 302/34, IPC, and the case was committed to the Sessions Court for trial.

3. At the trial, the prosecution examined as many as 24 witnesses. Rashid was examined as PW-3 and Shamim was examined as PW-4. Both PW- 3 and PW-4 supported the prosecution case as narrated in the FIR. Besides these two eyewitnesses, two more eyewitnesses, who on 11.02.2001 at about 9.00 P.M., were gossiping in front of a shop near the place of occurrence, Yusuf and Jahid, were examined as PW-5 and PW- 7 and they also supported the prosecution case as narrated in the FIR. The trial court, after considering the evidence of the four eyewitnesses as well as the medical and other evidence on record, held that both the accused persons, the appellant and Abuzar Hossain, were guilty of the offence under Section 302/34, IPC. The trial court also heard the parties on the question of sentence and sentenced each of the two accused persons to suffer life imprisonment and also each of the accused persons to pay a fine of Rs.5,000/- and in default to suffer R.I. for one more year. Aggrieved, the appellant filed C.R.A. No.244 of 2003 before the High Court but the High Court dismissed the appeal and affirmed the conviction and sentence imposed on the appellant by the trial court.

4. Mr. S.B. Sanyal, learned senior counsel for the appellant, submitted that the ocular evidence of PW-3, PW-4, PW-5 and PW-7 ought not to have been believed because it is inconsistent with the medical evidence in the present case. He submitted that these witnesses have said before the Court that the appellant and his associates surrounded the deceased and all of them fired at the deceased but the medical evidence reveals that there was only one bullet injury on deceased. He further submitted that as per the Forensic Science Laboratory report dated 04.06.2001, the bullet fired was of a .303 rifle, but the eyewitnesses have said that the assailants had fired from revolvers. He submitted that if a rifle has been actually used to kill the deceased, the firing must have taken place from a long distance and not from a short distance as alleged by the eyewitnesses. He further submitted that the truth is that Raju, who was the younger brother of the deceased, was interested in the property of the deceased, who was a wealthy person, and it is Raju who had killed the deceased and had set up the witnesses against the appellant. He submitted that evidence on record establishes that Raju and PW-3 reside in the same premises and PW-4 is a close friend of PW-3, PW-5 knew Raju since his boyhood and PW-7 was a close friend of both PW-4 as well as Raju and PW-5 and PW-7 are friends. He vehemently argued that all the eyewitnesses were, therefore, interested witnesses and should not have been believed. He further argued that no Test Identification Parade was held at the time of investigation and

it was not possible for the witnesses to identify the appellant as one of the persons who fired at the deceased.

5. Mr. Sanyal cited the decision of this Court in *Mani Ram Ors. v. State of U.P.* [1994 Supp.(2) SCC 289] for the proposition that where the direct evidence was not supported by the expert evidence, it would be difficult to convict the accused on the basis of such evidence. He also relied on *State of Punjab v. Rajinder Singh* [(2009) 15 SCC 612] in which it was held that the prosecution story was doubtful because there was clear inconsistency between medical evidence and ocular evidence. He submitted that the report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination under Section 313 of the Criminal Procedure Code (for short 'Cr.P.C.'). He cited the decision of this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116] in which it has been held that the circumstances, which were not put to the accused in his examination under Section 313 of the Criminal Procedure Code, 1973, have to be completely excluded from consideration. According to Mr. Sanyal, therefore, this is a fit case in which the appellant should be acquitted of the charges under Section 302/34, IPC, and the judgments of the High Court and the trial court should be set aside.

6. Mr. Chanchal Kumar Ganguli, learned counsel appearing for the State, on the other hand, strongly relied on the evidence of eyewitnesses, namely, PW-3, PW-4, PW-5, and PW-7 who had all supported the prosecution case. He submitted that all the eyewitnesses have named the appellant as the person who was holding a gun and who shot the deceased. He referred to the report dated 04.06.2001 of the Forensic Science Laboratory which clearly revealed that the two bullets (Ext.B I) were fired through an improvised fire arm, one hit the deceased in the occipital region and the other grazed the deceased in the temporal region. He also referred to the seizure list Ext.-2 to show that an empty cartridge and one bullet head were also found at the place of occurrence. He submitted that the contention of Mr. Sanyal that the report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination under Section 313, Cr.P.C., is not correct. He referred to the question put by the trial court to the appellant in which it was brought to the notice of the appellant that the I.O. sent the seized articles to the Forensic Science Laboratory after completion of the investigation and only thereafter the chargesheet was filed against the appellant. He cited the decision in *Gamini Bala Koteswara Rao Ors. v. State of Andhra Pradesh through Secretary* [(2009) 10 SCC 636] in which this Court has taken a view on facts that the medical evidence did not in any way contradict the ocular evidence. He submitted that there is no inconsistency between the ocular evidence and the medical evidence in this

case and this Court should also accept the ocular evidence of the four eyewitnesses who had seen the appellant firing at the deceased.

7. We may first deal with the arguments of Mr. Sanyal that the medical evidence in this case is such as to make the prosecution story as told by PW-3, PW-4, PW-5 and PW-7 improbable. We extract hereinbelow the relevant portions of the evidence of PW-3, PW-4, PW-5 and PW-7: PW-3 - I heard a sound of firing in the direction of B-35, Iron Gate Road. On hearing this we ran towards the B-35, Iron Gate Road and found Daren with 8/10 others surrounded Mogal from all sides. Daren and his associates were armed with gun. They uttered in a single voice that Mogal should be finished. Saying this they fired at Mogal, Mogal fell on the ground with bullet injury.

PW-4 - After some time I heard a sound of firing from the direction of B-35, Iron Gate Road. I myself and Rashid ran a few distance and found Daren and eight or ten others. Some of them Mughal from behind and no by the side of Mughal. They all uttered in a voice that Mughal should be finished. Saying this Daryen and his associates started firing upon Mughal. As a result of such firing Mughal fell on the B-35, Iron Gate Road.

PW-5 - I found also Mughal Bhai coming from the side of Bangalee Bazar and when he arrived near the mouth of the lane at B-35, Iron Gate Road at that time Daryen, Abuzar Hossain and other associates Daryen detained Mughal Bhai. There were about 8/10 persons armed with revolvers. The Daryen and his associates surrounded Mughal from his left side and back side. One of those 8/10 persons fired from the revolver and then Daryen and Abuzar Hossain said to his associates to kill Jahangir @ Mughal. Immediately all the persons fired upon Jahangir @ Mughal. I could identify only Daryen and Abuzar Hossain (identified on the dock). Mughal instantly fell down on the ground.

PW-7 - At about 9.50 p.m. I found that Mughal Bahi was coming from the side of Bangalee Bazar towards ourselves and when he reached near B-35, Iron Gate Road at that time Daryen and Abuzar Hossain and others encircled Mughal from his behind and side. Out of those persons somebody fired. Then Daryen, Abuzar and others abusd filthily Mughal and started firing at random and fired about 6/7 times. They also uttered, Saleko Khatam Kar do. (identified the accused Daryen and Abuzar on the dock).

It will be clear from the evidence of PW-3, PW-4, PW-5 and PW-7 that the consistent version of all the four eyewitnesses is that the appellant and his associates fired at the deceased and as a result the deceased fell down.

8. The medical evidence of this case is of Dr. Amitava Das, PW-12, who carried out the post mortem on the dead body of deceased. He has stated that on the dead body of the deceased he found the following injuries:

1. Injury abrasion 1x = over left forehead. 1 = left to mid-line and = above left eye-brow.
2. Abrasion -1x = over left side of face just above the monistic and 2 left to mid-line.
3. Abrasion - 2x1 over interior aspect of lower part of right chest-wall 9 below right clavicle and 2 = right to interior mid- line.
4. Graze abrasion-4x1 over posterior aspect of lower part of right arm and right elbow.
5. Graze Abrasion 1= x 1 over posterior aspect of left elbow.
6. One lacerated wound - = x < into bone over right side temporal region, 1 right of outer of Canvas of right eye and 4 above the right angle of mandible and 5.5 above right heel with evidence of gutter fracture involving outer table of right temporal bone-might have been caused by a grazing bullet.
7. One wound of entrance of gun-shot injury of size = to = more or less oval in shape with radish margin with abrasion 0.2 surrounding it with brushing underneath with evidence of no protrusion of fat and evidence of turning of body hair was placed over right side of posterior aspect of neck just below the hair border just right to posterior mid-line 1 below external occipital pursuance 5 ft.2 above right heel.

He has also stated that in his opinion the death was due to the effects of gun shot injury which was ante-mortem and homicidal in nature. This obviously refers to injury No.7. Regarding injury No.6, he has stated that it was not possible for him to say that the injury was caused by grazing by the bullet or not. Thus the medical evidence is also clear that the death of the deceased

was caused by a bullet injury. The medical evidence clearly supports and does not contradict the ocular evidence of PW-3, PW-4, PW-5 and PW-7 that the deceased was killed by the gun shots fired by the appellant and his associates.

9. In a recent judgment in *Abdul Sayeed vs. State of Madhya Pradesh* [(2010) 10 SCC 259] this Court after considering its earlier decisions in *Ram Narain Singh vs. State of Punjab* [(1975) 4 SCC 497], *State of Haryana vs. Bhagirath* [(1999) 5 SCC 96], *Solanki Chimanbhai Ukabhai vs. State of Gujarat* [(1983) 2 SCC 174], *Mani Ram vs. State of U.P.* [(1994 Supp (2) SCC 289], *Khambam Raja Reddy vs. Public Prosecutor* [(2006) 11 SCC 239], *State of U.P. vs. Dinesh* [(2009) 11 SCC 566 and *State of U.P. vs. Hari Chand* [(2009) 13 SCC 542] has held:

though the ocular testimony of witness has greater evidentiary value vis-à-vis medical evidence when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence maybe disbelieved.

In the facts of the present case, as we have seen, the medical evidence does not go so far as to rule out all possibility of the ocular evidence being true. Hence, the ocular evidence cannot be disbelieved.

10. We now turn to the submission of Mr. Sanyal that as per the Forensic Science Laboratory Report dated 04.06.2001 the bullet was of .303 rifle whereas the eyewitnesses have said that the assailants had fired from revolvers. PW-12 who carried out the post-mortem on the dead body of the deceased has stated that 8 articles were preserved after the post mortem and these included skin from wound of entry and foreign body (bullet). PW- 24 who took up further investigation of the case has deposed that on 16.02.2001 he received sealed packets collected from CMOH, Alipore during autopsy like blood, foreign body (bullet) hair etc. and on 16.04.2001 he sent these articles to Forensic Science Laboratory and thereafter received the reports from the Forensic Science Laboratory on different dates. The report dated 04.06.2001 of the Forensic Science Laboratory contains the result of examination of some of these articles. These articles are an envelope marked A containing one deformed fired case of a .303 rifle cartridge (Ext. A), an envelope marked B containing one fired-nose bullet of .315/ 8mm caliber (Ext. B), the glass Phial marked I containing one fired metal jacketed bullet of improvised make having dark brown bloody stains (Ext. I) and a glass phial J containing semi-solid

substance said to be a piece of human skin (Ext. J). The results of the examination of these articles as given in the report dated 04.06.2001 of the Forensic Science Laboratory are as follows:

The physical condition of ext.A suggested that it was used for firing through an improvised firearm capable of firing .303 rifle cartridges.

Although exhibits B and I were not of identical calibers but both were found to have been fired through improvised firearm. The scratch mark-patterns on B and I were found to match characteristically while compared under microscope. Hence it was revealed that both the exhibits B and I were fired through the same improvised firearm.

No opinion could be given on exhibit J as it was unfit for any examination.

The report dated 04.06.2001 of the Forensic Science Laboratory thus is clear that the fire arms used by the appellant and his associates were improvised firearms capable of firing .303 rifle cartridges.

11. Dr. B.R. Sharma in his book on Firearms in Criminal Investigation Trials published by the Universal Law Publishing Co., Fourth Edition, has in Chapter 11 on Improvised Firearms classified country-made firearms with reference to the ammunition used in them: 12 bore firearms and .303 firearms. Dr. Sharma has also classified country-made firearms according to the manner in which they are fired: shoulder firearms or the handguns. Dr. Sharma has stated that country-made firearms are non-standard firearms and they are not tested or proved for their fire-worthiness and are, therefore, usually imperfect contrivances. He has also stated that the poor construction of the firearms affects the firing process in many respects and sometimes the incomplete combustion inhibits a complete and proper development of pressure and the projectiles do not acquire standard velocities or striking energies.

12. Considering the evidence on record and the opinions of experts we have discussed, we have no doubt that the deceased has not been shot by a rifle from a long distance but by improvised or country-made handguns capable of firing .303 rifle cartridges from a short distance. PW-3 has described these as guns, whereas PW-5 has described these as revolvers because he has not been able to distinguish a revolver from a country-made handgun. PW-4 and PW-7 are silent on whether the appellant and his associates have used guns or revolvers. Some of these eyewitnesses have said that all the assailants fired but they could not have known

how many projectiles were actually ejected from these defective improvised firearms as a result of firing. One bullet has been recovered from the occipital region of the deceased and another bullet and an empty cartridge have been recovered from the place of occurrence. Hence, in the present case, the fact that the other bullets were not recovered either from the body of the deceased or from the place of occurrence does not belie the prosecution story that the appellant and his associates fired and killed the deceased.

13. We may now consider the argument of Mr. Sanyal that Raju who was the younger brother of the deceased had actually killed the deceased and had set up the witnesses against the appellant and that PW-3, PW-4, PW-5 and PW- 7 were directly or indirectly connected with Raju and were all interested witnesses. We do not find any material on record to support the contention of Mr. Sanyal that Raju was behind the killing of the deceased. The witnesses PW-3 and PW-4 were chatting at the junction of Risaldar Gate Road and Iron Gate Road and PW5 and PW-7 were gossiping in front of the shop of PW-6. All four eyewitnesses were of the locality in which the incident took place and happened to be at the place of occurrence at the time of the incident and their evidence would show that they have stated whatever they have actually observed. Although, during cross examination the defence has suggested to these witnesses that their evidence implicating the appellant is false, the defence has not been able to create a reasonable doubt about the veracity of their evidence. We cannot therefore accept the submission of Mr. Sanyal that the four eyewitnesses were directly or indirectly connected with Raju and had implicated the appellant for the offence at the instance of Raju who was the man behind the killing of the deceased.

14. We also do not find any merit in the submission of Mr. Sanyal that as no Test Identification Parade was held at the time of investigation, the eyewitnesses could not have identified the appellant as one of the persons who fired at the deceased. The appellant, PW-3 and PW-4 were residents of Iron Gate Road, which was the part of the Garden Reach Police Station. PW- 5 and PW-7 were residents of Bichali Ghat Road which is also part of the same Police Station Garden Reach. Hence, the appellant and the four eyewitnesses belonged to the same locality and the four eyewitnesses knew the appellant before the incident and were able to immediately identify the appellant at the time of the incident. It is only if the appellant was a stranger to the eyewitnesses that Test Identification Parade would have been necessary at the time of investigation.

15. Coming now to the submission of Mr. Sanyal that the Report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination

under Section 313 Cr.P.C., we find that PW-24 has stated in his evidence that he has received four Forensic Science Laboratory Reports on different dates and PW-4 has been cross examined on behalf of the appellant. We also find from the examination of the appellant under Section 313 Cr. P.C. that the court did put a question to him that PW-24 who took up further investigation of the case sent the seized articles to the Forensic Science Laboratory including articles collected from ACMOH Alipore and after completion of investigation submitted charge-sheet against both the accused persons under Sections 302/34 IPC and sought a reply from the appellant. The evidence of PW-24 was recorded by the Court in the presence of the appellant and the report dated 04.06.2001 of the Forensic Science Laboratory was marked as Ext.14 on 24.02.2003 and the Court had also put it to the appellant during his examination on 04.03.2003 that the seized articles were sent to the Forensic Science Laboratory, yet the appellant has stated in his reply before the Court that he was not aware. The appellant could have stated on 04.03.2001 if he had anything to say on the report dated 04.06.2001 of the Forensic Science Laboratory. Thus, although the content of the report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination under Section 313, Cr.P.C., the appellant was not in any way prejudiced. In *State of Punjab v. Swaran Singh* (AIR 2005 3114), this Court has held relying on the earlier decisions of this Court that where the accused was not in any way prejudiced by not giving him an opportunity to answer specifically regarding evidence which was recorded in his presence, such evidence cannot be excluded from consideration by the Court.

16. We find that the High Court has held in the impugned judgment that all the eyewitnesses have given a vivid and true account of the incident and had seen the occurrence on close range and as they were residents of the locality they had no problem in identifying the assailants and there was nothing on record suggesting that they nurtured ill feeling and harboured enmity against the appellant and that the evidence of the eyewitnesses was consistent and finds due corroboration from the post mortem report. In our considered opinion, the High Court has rightly sustained the conviction of the appellant on the evidence of four eyewitnesses as corroborated by the medical evidence.

17. In the result, we find no merit in the appeal which is accordingly dismissed.